- "Cooke 'cynically helped orchestrate this campaign for his own financial gain, fannedthe flames with his racial rhetoric, to force the company to settle these bogus claims'."
- UDF was "the victim of a 'gigantic fraud'."

(*Id.* at 14a-15a)

Shortly after Respondents' press conference, Cooke held his own press conference in response, where he presented Munyan herself and he generally denied the substance of the comments she attributed to him on the videotape. (*Id.* at 47a)

VI. The Appellate Court's Dismissal Of Cooke's Defamation Claim From Which He Seeks Review By This Court

A. Gillan's Statements Held To Be Non-Actionable "Opinion" Because Gillan Was Reacting To The Negative Publicity Engendered By Cooke

The appellate court applied the four-part test set down by the Supreme Court of Ohio in *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St. 3d 279, 281-82, 649 N.E.2d 182, 185, for determining whether particular statements are constitutionally protected "opinion." (*Id.* at 12a-13a) It concluded, with one exception, that Gillan's statements were "rhetorical hyperbole that would suggest to the listener that this is . . . Gillan's interpretation of Cooke's conduct," rather than a statement of fact. (*Id.* at 14a) Moreover, the appellate court further found that to "counter the negative publicity engendered by the Williamses' claims of racial discrimination . . . Gillan clearly

considered himself to be 'fighting fire with fire' by attempting to try the case in the court of public opinion." (*Id.* at 15a)

B. Because Of Cooke's Publicizing His Allegations Of Race Discrimination Against UDF, He Was A Limited Purpose Public Figure, And The Allegedly False Statement(s) By Gillan Were Not Made With Actual Malice; Hence They Are Non-Actionable

Although the appellate court found that Gillan's statement that Cooke represented the Williamses during the course of the OCRC proceedings was false (*id.* at 16a-18a), it nonetheless concluded that because Cooke was a limited purpose public figure as a result of his ongoing efforts to publicize the allegations of race discrimination against UDF, a defamation claim against Gillan would not lie unless Gillan made that statement with "actual malice." (*Id.* at 19a-20a)

Based on Gillan's deposition testimony – *i.e.*, that although Cooke did not initially represent the Williamses in the OCRC proceedings, he did in fact subsequently appear on their behalf after the OCRC issued the complaint and continued its "litigation around the complaint" – the court found that Gillan was not "aware that this statement was false at the time he made it." (*Id.* at 20a-22a) Hence, the appellate court concluded that "Cooke failed to raise a genuine issue of material fact as to whether Gillan acted with actual malice in stating that

Cooke represented the Williamses at the time of the OCRC complaint." (*Id.* at 22a)[4]

SUMMARY OF ARGUMENT

Petitioner Cooke willingly and admittedly thrust himself into the public eye by highly publicizing the discrimination lawsuits he initiated on behalf of his clients against Respondent United Dairy Farmers. In his own words, " . . . the decision was to at least make the lawsuit public . . . and that the public is at least aware of that . . . not simply to prosecute the case, but to possibly alert others. . . . [I]t was really a sense of responsibility to at least let the public know." Simply because Cooke did not violate any law, or Rules of Professional Conduct, does not mean that he cannot become a limited purpose public figure – so that actual malice must exist with respect to any alleged defamatory statements attributable to the subject matter Cooke publicized.

Where, as here, the plaintiff claiming to be defamed "voluntarily and deliberately thrust himself to the forefront

[4] Although not necessarily germane here, Maude Williams' lawsuit was tried in federal court in the fall of 1998, and resulted in a defense verdict. (*Id.* at 11) At that trial, the court allowed the Munyan videotape to be played and admitted into evidence. (*Id.*) After the jury verdict in *Williams* (and well after the earlier-in-time June 4, 1998 press conference), Williams filed a motion for a new trial (again relying on evidence not available at the time of the first trial) based upon her allegation that the tape was fabricated, yet that trial also resulted in a verdict for the defendants. (*Id.*) As for the other proceeding initiated by Cooke on behalf of the other employees and former employees, applicants and customers of UDF, a verdict was rendered in favor of three of the five plaintiffs whose claims proceeded to trial. (*Id.*)

of the controversy," courts have consistently held him to be a public figure with respect to those issues which the plaintiff put into play. The courts below correctly applied the standard implemented by this Court in *Gertz v. Welch*, 418 U.S. 323 (1974), and its progeny. Hence, Cooke's petition should be denied.

REASONS FOR DENYING REVIEW

I. The Courts Below Properly Applied The Public Figure Standard That Has Consistently Been Articulated By This Court In *Gertz v. Robert Welch, Inc.*, And Followed Since By Courts Throughout The Country; *i.e.*, Whether The Defamation Plaintiff Voluntarily Thrust Himself To The Forefront Of The Controversy

In his Petition, Cooke accurately describes how this Court has progressed from requiring *public officials* to demonstrate the presence of "actual malice" to sustain a defamation claim, to mandating that *public figures* who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved," must do the same. *See* Pet. at 13, *citing New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), quoting from *Gertz* at 345. Significantly, Cooke does not make the slightest attempt to refute that he did in fact "thrust himself to the forefront of the controversy" here, by virtue of the media blitz he initiated and sustained over the two year period preceding the June 1998 press conference. Instead, Cooke is asking this Court to consider an exception to that principle for attorneys who, as he did, seek to

try their cases in the media – so long as they do not violate any law or professional code – rather than in the courtroom.

The history since *Gertz* regarding the public figure doctrine belies such a notion. Neither this Court, nor any other, has held that as long as a private individual does not violate any law or code they cannot become a public figure. If Cooke's proposed postulate were true, then he could publish a weekly newsletter, distribute it locally (or even nationally), attacking UDF; he could pay for a weekly (or daily) television (and radio) slot and vent his criticism of UDF; and/or he could organize and lead a weekly rally in Cincinnati, Ohio, UDF's headquarters, or multiple cities throughout the state (or even nationally), protesting what he considered to be unfair or even unlawful conduct on the part of UDF.[5] All this, according to Cooke, could not confer public figure status on him if, in the process, he violated no law or professional code. That not only is contrary to *Gertz* and its progeny; it defies all logic.

Various activities on the part of plaintiffs have been considered by courts in determining whether or not they are public figures:

> Radio or television appearances have often been cited as a factor in finding the plaintiff to be a public figure. . . . Making speeches or public appearances on the subject of the defamation has been considered by the courts as a factor in the public figure determination, as has granting interviews to the press, particularly where the

[5] In actuality that is essentially what Cooke did here, albeit on a more local level.

> plaintiff initiated such contacts, and making various other efforts to publicize the plaintiff's position, such as holding press conferences, distributing brochures, issuing press releases, submitting defamatory material to a television station, writing letters to newspapers and other media, hiring a public relations firm, and arranging for media coverage.
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> * * *
>
> Extensive press or media coverage of the plaintiff or the controversy prior to the allegedly defamatory publication is frequently mentioned by the courts as evidence of public figure status.

See Tracy A. Bateman, Annotation, *Who Is "Public Figure" For Purposes Of Defamation Action*, 19 A.L.R. 5th 1, 60-62 and 63 (1992). Further, as in this case, "[w]here the plaintiff used the media to respond to the defamation [as Cooke did with his own post-UDF/Gillan press conference] . . . courts have considered this to be important." *Id.*; *cf. Doe v. Kohn Nast & Graf, P.C.* (E.D. Pa. 1994), 866 F. Supp. 190 (in case strikingly similar to the instant one, court refused to recognize an attorney's defamation claim when he transformed litigation into a matter of public concern).[6]

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[6] In that case the court recognized:

> [T]he vogue appears to be that lawyers seem to be unable to resist corralling a press conference, inviting all the media, both paper and electronic, to trumpet the alleged virtues of their case before the jury has been impaneled. Too many lawyers are trying to try their cases in that arena rather than the proper forum for getting to the truth, within the bounds of due process and fair play. Nevertheless, if that's the way the litigious game is being played today, it strikes

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Nothing in any of the foregoing criteria even suggests that the conduct must be unlawful or violative of any code; rather, the touchstone, as noted by this Court in *Gertz*, is how "they [*i.e.*, the plaintiffs] have thrust themselves to the forefront of particular public controversies." 118 U.S. at 345. Individuals acting in such a voluntary manner consistently have been held to be public figures. *See, e.g., Woy v. Turner*, 573 F. Supp 35, 38 (N.D. Ga. 1983) (plaintiff-sports agent held to have "voluntarily thrust himself into the forefront" of the controversy because he "made himself readily available for interviews and media attention, and even actively initiated media attention on a regular basis," including holding a press conference); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1334 (W.D. Pa. 1974) (plaintiff-taxicab company owner "thrust himself into the controversy" when he "intentionally sought the press and the media to publicize his criticism of Yellow Cab's rate increase"); *Finkelstein v. Albany Herald Pub. Co.*, 195 Ga. App. 95, 392 S.E.2d 559, 561 (1990) (" . . . three days before the publication of the original [allegedly defamatory] article the plaintiff [who, like Cooke here, was an attorney] made an appearance on a local television program for the purpose of . . . discussing 'the problems . . . with the district attorney's office [which were referenced in the allegedly defamatory article]'," and thereby "voluntarily and deliberately thrust himself into the forefront of the controversy"), *cert. den.* (Apr. 18, 1990); *Hayes v. Booth*

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me as fair game that the other side be given the opportunity to talk back from a pedestal of similar visibility, without being susceptible to a defamation judgment.

Id. at 195 n.1.

Newspapers, Inc., 97 Mich. App. 738, 295 N.W.2d 858, 865-66 (1980) (attorney alleging he was defamed held to be public figure " . . . by the manner in which he conducted himself in a public judicial proceeding, invited attention and comment, and did so as well as taking affirmative steps to attract attention when he consented to the television as well as newspaper interviews.").

II. Consistent With Prior Precedent, The Courts Below Also Correctly Determined That Petitioner Was A Public Figure For Only A Limited Range Of Issues, But Which Included Those That Were The Subject Of The Alleged Defamatory Statements About Which Petitioner Complains

Moreover, a private person deemed to be a public figure under these circumstances is not relegated to the burden of proving "actual malice" with respect to *any* allegedly defamatory comments about him. As this Court pointed out in *Gertz*, " . . . an individual who voluntarily injects himself into a particular public controversy . . . thereby becomes a public figure for a *limited* range of issues." 418 U.S. at 323 (emphasis added). Applying this concept, the appellate court below noted: "A limited purpose public figure is one who becomes a public figure for a *specific range* of issues by being drawn into or voluntarily injecting himself into a specific public controversy." *See* Pet. at 19a (emphasis added; citations omitted).

Respondents never have taken the position, nor have the courts below held, that Cooke was a public figure for *all* purposes. In fact, the trial court specifically recognized

that the allegedly defamatory comments about which Cooke complained were consistent with the foregoing limitation, in that they pertained solely to those issues Cooke himself put into controversy:

> The statements made by Defendants at the June 4, 1998 press conference were about those same allegations [*i.e.*, the allegations of racial discrimination Cooke made against UDF over the preceding two years]. The statements were limited in scope to the purpose of informing the public of this new evidence that had surfaced indicating that Patti Munyan had been asked to testify falsely about the evidence of racial discrimination at UDF.

See Pet. at 44a.

Consequently the courts below not only applied the appropriate standard in finding Cooke to be a public figure, they also correctly limited the application of that status to only those matters he raised in the first instance.

CONCLUSION

The courts below correctly followed long-standing precedent of this Court. The exception Petitioner urges this Court to consider carving out from that precedent is ill-conceived and not based on any authority previously articulated by this or any other court. Accordingly, Respondents herein respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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